



Comptroller General
of the United States

Washington, D.C. 20548

Ahearn

146475

Decision

Matter of: Racal Filter Technologies, Ltd.--Request for
Declaration of Entitlement to Costs

File: B-244471.5

Date: April 24, 1992

Richard L. Moorhouse, Esq., and Robert G. Bugge, Esq.,
Dunnells, Duvall & Porter, for the protester,
Jeffrey I. Kessler, Esq., and John J. Welling, Esq.,
Department of the Army, for the agency,
M. Penny Ahearn, Esq., John M. Melody, Esq., and David
Ashen, Esq., Office of the General Counsel, GAO,
participated in the participation of the decision.

DIGEST

Protester is not entitled to costs of filing and pursuing protests under section 21.6(e) of the General Accounting Office (GAO) Bid Protest Regulations based on agency corrective actions; where protests were filed prior to agency's award decision, they were premature, and when agency finally determined--as protester had argued--that protester, not one of the lower bidders, was entitled to award, determination was merely culmination of award process, not corrective action.

DECISION

Racal Filter Technologies, Ltd. requests that our Office declare it entitled to recover the reasonable costs of filing and pursuing two protests and a request for reconsideration under invitation for bids No. DAAA09-91-B-0022, issued by the Department of the Army. We dismissed Racal's original protest as premature and the firm's second protest and request for reconsideration as academic.

We deny the request.

Racal originally protested the award of any contract on June 14, 1991. Racal was the third low bidder; it contended that the two low bids were nonresponsive and should be rejected. Subsequent to the filing of the original protest, the Army advised us that it had made no award decision and, in fact, was still considering the responsiveness issues. In light of the status of the procurement, we dismissed the original protest as premature on July 17, since it merely anticipated improper agency action.

Racal then requested reconsideration of this dismissal and also submitted a second protest on the procurement. In its request for reconsideration, Racal argued that its original protest was not premature because it challenged the continuing failure of the agency to reject the contested bids 3 weeks after bid opening. In its second protest, Racal repeated this complaint and also argued that the agency improperly had commenced preaward surveys for the two low bidders prior to determining the responsiveness of their bids. Subsequent to the filing of the request for reconsideration and the second protest, the Army advised us that it had rejected one of the two contested low bids as nonresponsive and permitted the withdrawal of the other, Racal, as the remaining low bidder, was then in line for award. In light of this development, we dismissed Racal's request for reconsideration and second protest as academic, since they no longer had any practical significance. See Racal Filter Technologies, Ltd.--Recon.; Racal Filter Technologies, Ltd., B-244471.2; B-244471.3, Oct. 8, 1991, 91-2 CPD ¶ ____.


In support of its request here, Racal maintains that the situation falls within the circumstances our Office has described as appropriate for the award of protest costs, i.e., the procuring agency unduly delayed taking corrective action in the face of a clearly meritorious protest. See Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. Specifically, Racal contends that the 5-month time period from the filing of its original protest until the agency's action in rejecting or permitting withdrawal of the two low bids constituted an undue delay on the agency's part in taking corrective action on the firm's meritorious protests. According to Racal, this delay caused the firm to expend significant resources of time and money in order to compel the Army to take proper action, and therefore the firm is entitled to reimbursement of its costs.

In response to Racal's claim, the Army contends that because the firm's protests were filed prematurely, before the agency's final award decision was made, the protester is not entitled to protest costs. In this regard, the agency states that there was no impropriety in the amount of time taken to make the careful determinations necessary for the award decision here. (Indeed, according to the Army, Racal's premature protests served only to delay the agency's award decision, since the same agency staff responsible for defending the protests were responsible for doing the preliminary work necessary for the contracting officer's decision concerning award.)

We agree with the Army. Under section 21.6(e) of our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1992), we may

declare a protester entitled to recover the reasonable costs of filing and pursuing a protest where the record shows that the procuring agency acted in violation of a procurement statute or regulation and unduly delayed taking corrective action in response to the protest. See Oklahoma Indian Corp.--Claim for Costs, supra; Building Servs. Unlimited, Inc.--Claim for Costs, B-243735.3, Aug. 27, 1991, 91-2 CPD ¶ 200; see also 56 Fed. Reg. 3759, 3762 (1991) (preamble to Bid Protest Regulations). Here, the action taken by the Army was not corrective action taken in response to a protest, that is, there is no indication in the record that the agency acted in violation of statute or regulation and subsequently took action because of such a violation. Rather, the agency simply made decisions necessary during the course of the procurement process in order to make the proper award determination. Racal's protests essentially anticipated improper agency action; they were not necessary to protect its competitive position, since, delay in the agency's determination notwithstanding, no final decision as to award had been made at the time of the firm's filings with our Office. Consequently, the agency action taken here provides no basis for a determination that the payment of protest costs is warranted.

The request is denied.


for James F. Hinchman
General Counsel